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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
JOHN WOLFENBARGER,  
Defendant.

**Case No.: CR 16-519 LHK**

**DEFENDANT'S RESPONSE TO  
COURT'S PROPOSED INSTRUCTION  
RE: MARCEAU TESTIMONY**

**Court:** Hon. Lucy H. Koh  
**Hearing Date:** TBA

The defense respectfully submits the following response to the Court's proposed instruction regarding the testimony of Agent Marceau based on hearsay. The defense proposes additions or modifications to the Court's proposed instruction as indicated by underlined text.

Specifically, the defense requests that the Court add a second paragraph instructing the jury that it may not consider testimony by Agent Marceau in which he made factual assertions that were based on hearsay statements by third parties, and requests that the Court then introduce what would now be the third paragraph with “As one example, . . .”

Due to the pervasive nature of Agent Marceau's reliance on hearsay to make factual assertions,

1 the defense respectfully submits that this additional language is warranted.  
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4 Dated: August 11, 2021

Respectfully submitted,

5 GEOFFREY HANSEN  
6 Acting Federal Public Defender  
Northern District of California  
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GRAHAM ARCHER  
9 Assistant Federal Public Defender  
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2                   **INSTRUCTION NO. 21**  
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4                   **INSTRUCTION REGARDING CHAT STATEMENTS,**  
5                   **AND STRIKING LIMITED TESTIMONY RE: GOVERNMENT EXHIBIT No. 3**

6                   The Court has instructed you that any statements made by anyone other than “jrwolfen02” in  
7                   the chats in Government Exhibit Nos. 3, 5, 7, 8 and 12 are not offered to prove the truth of the matter  
8                   asserted in those statements.

9                   For this reason, I further instruct you that you may not consider testimony by Agent Marceau in  
10                  which he relied on statements by anyone other than “jrwolfen02” to make factual assertions or offer  
11                  factual opinions.

12                  As one example, as to the chat in Government Exhibit No. 3, I further instruct you that the  
13                  Court strikes, and the jury may not consider, Agent Marceau’s testimony that a speaker in the chat  
14                  was a school-aged child based on that speaker’s discussion of going to a Christmas party at a school  
15                  or that the speakers in the chat changed.